

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 260 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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ATUL HASMUKHLAL SHAH

Versus

DEBOO BROS AND OTHERS

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Appearance :

MR JB PARDIWALA for Applicants No. 1, 1.2.1, 1.2.2,1.2.3
 RULE SERVED for Opponent No. 1.
 MR BS PATEL for Opponent No. 2.
 MRS RANJAN B PATEL for Opponent No. 2.
 UNSERVED-EXPIRED (R) for Opponent No. 3.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 06/03/2006

ORAL JUDGMENT

By filing this Civil Revision Application under Section 115 of Civil

Procedure Code, the applicant has challenged the order passed by Executing Court in Special Darkhast No.17/1990. By the impugned order, the Executing Court has dismissed the execution application filed by the applicant – original decree holder.

The applicant herein instituted a suit being Special Civil Suit No.48/1979 against Deboo Brothers, a partnership firm as well as against its partners. In the said suit, a money decree was passed by the trial Court and said Deboo Brothers was directed to pay Rs.43,352/- with 12% interest to the applicants – decree holder of the aforesaid suit. On the basis of said decree, the applicants herein filed an Execution Application being Special Darkhast No.17/1990 against the judgement-debtor, i.e., Deboo Brothers and its partners. Aforesaid Execution Application was replied by judgement debtor by his reply at Exh.28 contending inter alia that Execution Application is not maintainable and that there is no amount due from the judgement debtor. Learned Judge of the executing Court, thereafter permitted the parties to lead evidence in this behalf and came to the conclusion that the entry made in the books of account of Deboo and Company regarding receipt of money is not genuine entry and that the decretal amount is already satisfied. The Executing Court found that no suit was filed against Deboo and Company and whatever amount received from the defendants were credited in other accounts without obtaining their consent. The Executing Court also found that amount is credited by the plaintiff without filing suit against the defendant. The Executing Court found that no such amount is due against the defendant as per the decree. On that ground, execution application is rejected. Against the said order original decree holder has filed this revision application under Section 115 of Civil Procedure Code.

Mr.Pardiwala, learned advocate for the decree holder submitted that the Executing Court has not considered the provisions of Order XXI, Rule 2 of Civil Procedure Code and has not appropriately considered whether any adjustment was recorded as per the said provisions. Mr.Pardiwala further submitted that the Executing Court has tried to seat in appeal over the original decree. He also submitted that once a decree is passed, the Executing Court is required to execute the same as it is and the Executing Court cannot consider the merits of the case to find out whether the decree was rightly passed or not.

On the other hand, Mr.Patel, learned advocate has tried to support the order of the Executing Court.

In my view, the order passed by the learned Judge of the Executing Court is not sustainable. It is required to be noted that a decree is passed against Deboo Brothers and its partners in Special Civil Suit No.48/1979. Execution Application is also filed against the judgement debtors. It is required to be noted that the Execution Application is not filed against Deboo and company. Learned Judge was therefore required to consider whether the decree in question is required to be executed against judgement debtor – Deboo Brothers. Reading the judgment, one gets an impression that the learned Judge of the Executing Court has gone on the merits of the suit, which is not permissible as the Executing Court is not required to function as an appellate Court against the decree passed in a suit. Learned Judge has not stated even a single word in the order that whether after passing of decree any payment is made and certified as required under Order XXI of Civil Procedure Code. After the decree is passed, payment can be made as provided under Order XXI, Rule 2 of

Civil Procedure Code, which reads as under :

“Order XXI

2.Payment out of Court to decree-holder -(1) Where any money payable under a decree of any kind is paid out of Court, [or a decree of any kind is otherwise adjusted] in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgement-debtor (or any person who has become surety for the judgement-debtor) also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

[(2-A) No payment or adjustment shall be recorded at the instance of the judgement-debtor unless -

(a) the payment is made in the manner, provided in rule 1; or

(b) the payment or adjustment is proved by documentary evidence;

or

(c) the payment or adjustment is admitted by, or on

behalf of, the decree-holder in his reply to the notice given under sub-rule (2) of rule 1, or before the Court].

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree.”

Learned Judge of the Executing Court has not stated anything whether the decree in question is satisfied by recording adjustment as required under Order XXI, Rule 2 of Civil Procedure Code or whether any application is made by the judgement debtor for certification as required by Order XXI Rule 2 of Civil Procedure Code.

The Executing Court is not required to go beyond the decree. It is required to be noted that the Executing Court was required to consider whether the decree against Deboo Brothers is satisfied as provided by Order XXI of Civil Procedure Code and if not, the Court was required to execute the decree against Deboo Brothers. Deboo and company is not a judgement debtor nor any decree is passed against them, even the decree holder has not filed execution application against Deboo and company. Decree is admittedly passed against Deboo Brothers and Court was required to consider about the execution of the decree against Deboo Brothers. By any satisfactory evidence, in consonance with Order XXI Rule 2 of Civil Procedure Code, if Deboo Brothers is able to point out that it has satisfied the decree that stands on different footing. Whether the debt of Deboo Brothers was correctly shown in the books of accounts is not a question which is required to be decided by the Executing Court, as the Executing Court is required to execute the decree as it is. Learned

Judge of the Executing Court has observed in paragraph 6 of the order that decree was obtained in Special Civil Suit No.47/1979 against Deboo Brothers while the Execution Application is filed to recover the dues of Deboo and Company. It is required to be noted that Execution Application itself is filed against Deboo Brothers for execution of the decree passed in the aforesaid suit. If Deboo and Company has accepted the liability of payment to decree holder, the applicant herein can also file appropriate application in the Executing Court in this behalf and at the time of deciding such application, the Executing Court can decide the aforesaid question whether decree can be executed against Deboo and Company. When the decree holder has filed Execution Application against Deboo Brothers, the decree is required to be executed as it is and in accordance with law. The Executing Court cannot go beyond decree and the Executing Court is required to find out whether liability to satisfy the decretal dues is taken over by Deboo and Company on their shoulder.

Learned trial Judge has observed that entry in the books of account of Deboo and company about so called "hawala entry" is not genuine. In that case, the Court was required to find out whether decree against Deboo Brothers is required to be executed as per provisions of Order XXI of Civil Procedure Code or if there is no outstanding, whether it is certified as per Order XXI, Rule 2 of Civil Procedure Code. Learned Judge has not considered all these aspects and one gets an impression that the Court was trying to find out whether the decree is correctly passed or not.

In my view, order of the Executing Court is required to be set aside and the matter is required to be sent back to the Executing Court to

decide the same on merits *denovo* in light of the observations made herein above. The Executing Court shall find out whether the decree passed against Deboo Brothers is executable as provided under Order XXI of Civil Procedure Code. If the decree holder place into service any application for joining Deboo and Company as a party in execution proceedings on the ground that it has undertaken the liability of Deboo Brothers, the Court may consider such application in accordance with law, but in that case also, what is required to be seen is whether the decree passed against original judgement debtor can be executed against Deboo and Company, if it has taken liability over its shoulder. However, surely the executing Court shall not go on the merits of the decree passed by the Court and is required to execute the decree as it is. The Executing Court shall decide the matter in consonance with Order XXI, Rule 2 of Civil Procedure Code, in case any argument is advanced by the judgement debtor that he has made the payment after the decree is passed in favour of the decree holder. Rule is accordingly made absolute. Executing Court may decide Special Darkhast No.17/1990 preferred in Special Civil Suit No.48 of 1979 *denovo*. Aforesaid Special Darkhast may be decided as early as possible and latest within a period of six months from the date of receipt of writ from this Court.

(P.B.MAJMUDAR, J.)

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